AUG 31 2001

No. 00-9285

Supreme Court, U.S.
FILED
AUG 31 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WALTER MICKENS, JR.,

Petitioner,

vs.

JOHN B. TAYLOR,
Warden, Sussex I State Prison,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

2. Would an affirmative answer to Question 1 be a new rule within the meaning of *Teague* v. *Lane*?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

Petitioner has received a full hearing on his conflict claim and failed to show any actual conflict 5

A. The role of prevailing norms 5

B. No actual conflict 7

II

Teague applies to this case and is fairly included in the question presented 11

III

Pertinent Supreme Court precedent squarely states an adverse effect requirement 14

IV

When the holding of a Supreme Court precedent, by its terms, is contrary to a proposed rule, the latter rule is *per se* "new," notwithstanding the nuances of other cases 23

Conclusion 26

TABLE OF AUTHORITIES

Cases

Bonin v. Calderon, 59 F. 3d 815 (CA9 1995) 22

Bonin v. California, 494 U. S. 1039, 108 L. Ed. 2d 641,
110 S. Ct. 1506 (1990) 22

Breard v. Greene, 523 U. S. 371, 140 L. Ed. 2d 529,
118 S. Ct. 1352 (1998) 12

Brien v. United States, 695 F. 2d 10 (CA1 1982) 22

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469,
73 S. Ct. 397 (1953) 25

Burden v. Zant, 498 U. S. 433, 112 L. Ed. 2d 962,
111 S. Ct. 862 (1991) 22

Burden v. Zant, 510 U. S. 132, 126 L. Ed. 2d 611,
114 S. Ct. 654 (1994) 22, 23

Burger v. Kemp, 483 U. S. 776, 97 L. Ed. 2d 638,
107 S. Ct. 3114 (1987) 15, 21, 22

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347,
110 S. Ct. 1212 (1990) 23, 25

Cage v. Louisiana, 498 U. S. 39, 112 L. Ed. 2d 339,
111 S. Ct. 328 (1990) 19

Caldwell v. Mississippi, 472 U. S. 320, 86 L. Ed. 2d 231,
105 S. Ct. 2633 (1985) 24

California v. Ramos, 463 U. S. 992, 77 L. Ed. 2d 1171,
103 S. Ct. 3446 (1983) 24

Caspari v. Bohlen, 510 U. S. 383, 127 L. Ed. 2d 236,
114 S. Ct. 948 (1994) 11, 12, 13, 14, 22

Cuyler v. Sullivan, 446 U. S. 335, 64 L. Ed. 2d 333,
100 S. Ct. 1708 (1980) 15, 16, 18

Desist v. United States, 394 U. S. 244, 22 L. Ed. 2d 248,
89 S. Ct. 1030 (1969) 23

Espinosa v. Florida, 505 U. S. 1079, 120 L. Ed. 2d 854,
112 S. Ct. 2926 (1992) 18

Hohn v. United States, 524 U. S. 236, 141 L. Ed. 2d 242,
118 S. Ct. 1969 (1998) 18

Lambrix v. Singletary, 520 U. S. 518, 137 L. Ed. 2d 771,
117 S. Ct. 1517 (1997) 6, 13, 18

Mickens v. Commonwealth, 247 Va. 395,
442 S. E. 2d 678 (1994) 2, 3

Mickens v. Commonwealth, 249 Va. 423,
457 S. E. 2d 9 (1995) 3

Mickens v. Commonwealth, 252 Va. 315,
478 S. E. 2d 302 (1996) 3

Mickens v. Greene, 74 F. Supp. 2d 586
(DC ED Va. 1999) 3, 4, 10

Mickens v. Taylor, 227 F. 3d 203 (CA4 2000) 4, 24

Mickens v. Taylor, 240 F. 3d 348 (CA4 2001) 3, 4, 13

Mickens v. Taylor, 532 U. S. __, 149 L. Ed. 2d 467,
121 S. Ct. 1651 (2001) 11

Mickens v. Virginia, 513 U. S. 922, 130 L. Ed. 2d 271,
115 S. Ct. 307 (1994) 3

Mickens v. Virginia, 520 U. S. 1269, 138 L. Ed. 2d 202,
117 S. Ct. 2442 (1997) 14

Missouri v. Jenkins, 495 U. S. 33, 109 L. Ed. 2d 31,
110 S. Ct. 1651 (1990) 14

Nix v. Whiteside, 475 U. S. 157, 89 L. Ed. 2d 123,
106 S. Ct. 988 (1986) 6, 7

O'Dell v. Netherland, 521 U. S. 151, 138 L. Ed. 2d 351,
117 S. Ct. 1969 (1997) 24

Penry v. Johnson, 532 U. S. __, 150 L. Ed. 2d 9,
121 S. Ct. 1910 (2001) 12

People v. Bonin, 47 Cal. 3d 808, 254 Cal. Rptr. 298,
765 P. 2d 460 (1989) 22

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U. S. 477, 104 L. Ed. 2d 526,
109 S. Ct. 1917 (1989) 24

Schenck v. Pro-Choice Network, 519 U. S. 357,
137 L. Ed. 2d 1, 117 S. Ct. 855 (1997) 11

Simmons v. South Carolina, 512 U. S. 154,
129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994) 24

Smith v. Robbins, 528 U. S. 259, 145 L. Ed. 2d 756,
120 S. Ct. 746 (2000) 21

Strickland v. Washington, 466 U. S. 668,
80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 19, 20

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 11, 12, 18, 19

Tyler v. Cain, 533 U. S. __, 150 L. Ed. 2d 632,
121 S. Ct. 2478 (2001) 19

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389,
120 S. Ct. 1495 (2000) 12, 22, 25

Wood v. Georgia, 450 U. S. 261, 67 L. Ed. 2d 220,
101 S. Ct. 1097 (1981) 4, 16, 17, 18

United States Statute

28 U. S. C. § 2254(d) 12

Rule of Court

Supreme Court Rule 14.1(a) 11

Miscellaneous

American Bar Association, Model Rules of Professional
Conduct (2001 ed.) 8, 9, 10, 17, 21

American Law Institute, Restatement (Third) of the Law
Governing Lawyers (2000) 9, 10, 14, 15

Coyne, Inflicting *Payne* on Oklahoma: The Use of Victim
Impact Evidence During the Sentencing Phase of Capital
Cases, 45 Okla. L. Rev. 589 (1992) 14

Lay, The Writ of Habeas Corpus: A Complex Procedure for
a Simple Process, 77 Minn. L. Rev. 1015 (1993) 11

Liebman & Ryan, "Some Effectual Power": The Quantity
and Quality of Decisionmaking Required of the Federal
Courts, 98 Colum. L. Rev. 696 (1998) 12

D. Rhode & D. Luban, Legal Ethics (2d ed. 1995) 9

Scheidegger, Habeas Corpus, Relitigation, and the
Legislative Power, 98 Colum. L. Rev. 888 (1998) 12

Wallace, The Ethical Considerations of Defense Strategies
When Confronted With Victim-Impact Statement—Give
Us Dirty Laundry?!, 13 Thomas M. Cooley L. Rev. 991
(1996) 15

C. Wolfram, Modern Legal Ethics (1986) 22

IN THE

Supreme Court of the United States

WALTER MICKENS, JR.,

Petitioner,

vs.

JOHN B. TAYLOR,
Warden, Sussex I State Prison,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This Court's jurisprudence on attorney conflicts has established a compromise position, where a defendant who made no objection at trial is relieved of the normal burden of showing prejudice but must meet the lesser burden of showing

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

adverse effect. Petitioner's proposed rule in this case would not only change that rule but do so retroactively on habeas corpus, thereby overturning final judgments decided in accord with current law. To overturn such judgments for defense attorney malfeasance which had no effect on the outcome would be contrary to the interests of victims and society CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Nine years ago, Walter Mickens murdered Timothy Hall, who was then 17, by stabbing him to death. There were "143 separate 'sharp force injuries' to the victim's body." *Mickens* v. *Commonwealth*, 247 Va. 395, 399, 442 S. E. 2d 678, 682 (1994). Hall was last seen alive on March 28, 1992, and his body was discovered March 30, 1992. *Id.*, at 398-399, 442 S. E. 2d, at 681-682. Although he denied committing the crime at trial, J. A. 45, Mickens' identity as the killer was established by, among other evidence, his knowledge the victim had been stabbed, his express statement to the police he was guilty, his possession and sale of the victim's tennis shoes, and DNA analysis of semen from the scene. The DNA evidence, while not conclusive by itself, was powerfully corroborating in light of the other evidence. See 247 Va., at 400-401, 442 S. E. 2d, at 682.

Shortly before his death, Hall was the subject of juvenile court petitions as a result of a scuffle with his mother and his possession of a bread knife wrapped in newspaper. J. A. 391-394. Attorney Bryan Saunders was appointed to represent him. J. A. 396. On April 3, 1992, the juvenile case was dismissed due to Hall's death. J. A. 390.

On April 1, 1992, two days after discovery of the body, the local newspaper printed a story about Timothy Hall. J. A. 397-398 (copy of article); J. A. 168 (date). The article discusses the rumors that Hall was a male prostitute, the fact he lived at a friend's house rather than with his mother, the incident with his

mother and the resulting charges, and the concealed weapon allegation, erroneously referring to the latter as involving a gun rather than a knife. J. A. 397-398.

Attorney Saunders was appointed to represent Mickens, along with co-counsel Warren Keeling. "Saunders never told Mickens or Keeling that he had represented Hall . . . ." *Mickens* v. *Taylor*, 240 F. 3d 348, 354 (CA4 2001) (en banc). Keeling was primarily responsible for investigating the sentencing-phase issues. J. A. 172-173. He was aware of the newspaper article. J. A. 168.

In the penalty phase, the prosecution introduced Mickens' extensive criminal record, including two convictions of sodomy and four other felonies. Two of Mickens' surviving victims testified. Charles Siron testified that Mickens forcibly sodomized him in the city jail while holding a razor blade to his throat. Elementary school teacher Ruby Bunn testified that Mickens robbed her in her classroom by threatening a small child with a knife. 247 Va., at 410, 442 S. E. 2d, at 688. Mickens was sentenced to death, and the Virginia Supreme Court initially affirmed. *Id.*, at 412, 442 S. E. 2d, at 689. This Court vacated and remanded "for further consideration in light of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994)." *Mickens* v. *Virginia*, 513 U. S. 922 (1994). The Virginia Supreme Court remanded for a second penalty trial. *Mickens* v. *Commonwealth*, 249 Va. 423, 457 S. E. 2d 9 (1995). The second jury reached the same conclusion, and its verdict was affirmed. *Mickens* v. *Commonwealth*, 252 Va. 315, 478 S. E. 2d 302 (1996). Mickens filed a state habeas petition, prepared by new counsel. J. A. 103-125, 133. The Virginia Supreme Court denied it. J. A. 126.

On federal habeas corpus, Mickens raised the conflict issue for the first time. The District Court found he had cause for the default and that "the prejudice inquiry incorporates the test for the underlying claim." *Mickens* v. *Greene*, 74 F. Supp. 2d 586, 602 (DC ED Va. 1999).

The District Court held an evidentiary hearing, including testimony by both defense counsel. J. A. 155-253. The court found "that Saunders did not learn any confidential information from Hall that was **relevant** to Mickens' defense either on the merits or at sentencing." 74 F. Supp. 2d, at 606 (emphasis in original), J. A. 291. Further, "the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall." *Id.*, at 612, J. A. 303. The District Court denied the conflict claim, finding neither actual conflict, adverse effect, nor prejudice to excuse the default. *Id.*, at 615, J. A. 309.

On Mickens' related ineffective assistance of counsel claim, the District Court held it was both defaulted and meritless. "In light of the facts facing counsel . . . , counsel reasonably chose not to pursue a consent defense. Furthermore, the lack of mitigating evidence is attributable to the absence of such evidence rather than the failings of counsel." *Id.*, at 598, n. 6, J. A. 275.

A divided panel of the Court of Appeals reversed, finding that under *Wood* v. *Georgia*, 450 U. S. 261 (1981), no showing of an adverse effect is required in these circumstances. *Mickens* v. *Taylor*, 227 F. 3d 203, 210-211 (CA4 2000), J. A. 327-329. The en banc court disagreed, 240 F. 3d, at 360, J. A. 371-372, and reinstated the District Court decision. This Court granted Mickens' petition for certiorari on April 16, 2001.

SUMMARY OF ARGUMENT

Nix v. *Whiteside* establishes that the boundaries of the Sixth Amendment right to unconflicted counsel are not coextensive with professional norms. Instead, those norms mark an outer limit. A set of facts that does not constitute a conflict under professional norms does not violate the Sixth Amendment, but the converse is not necessarily true.

Duty to former clients is much more limited than duty to present clients under those norms. The continuing duty is to preserve confidential information, which is defined to exclude information that has since become public. There was no conflict in this case.

Teague v. *Lane* applies to this case and is fairly included in the question presented. *Caspari* v. *Bohlen* holds that a certiorari petitioner preserves the *Teague* issue by arguing it in the body of the certiorari petition. Argument in the body of the brief in opposition is therefore sufficient for the certiorari respondent.

Surveying the legal landscape, *Cuyler* v. *Sullivan*, *Strickland* v. *Washington*, *Burger* v. *Kemp*, and *Burden* v. *Zant* establish that an adverse effect must be shown by the habeas petitioner in the circumstances of the present case. *Wood* v. *Georgia* was a decision on an unargued, unbriefed point, which merely omitted discussion of an element not separately disputable on the facts of the case.

Where, as here, pertinent Supreme Court precedents state a rule which, on its face, applies to the present case, an argument that nuances of other cases create an unstated exception is *per se* a proposal for a "new rule" within the meaning of *Teague*.

ARGUMENT

I. Petitioner has received a full hearing on his conflict claim and failed to show any actual conflict.

A. The Role of Prevailing Norms.

The first question to be addressed is what role prevailing professional norms play in a Sixth Amendment conflict analysis. The *amici* who style themselves the "legal ethicists" contend, in essence, that every breach of prevailing professional norms should be deemed a violation of the Sixth Amendment and result, without more, in successful collateral attack on final

judgment in a criminal case. See Brief for Legal Ethicists *et al.* as *Amici Curiae* 17 (cited below as "Legal Ethicists' Brief"). However, this Court has already duly considered and unequivocally rejected this notion.

> "Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Nix* v. *Whiteside*, 475 U. S. 157, 166 (1986).

Not only is the position of the "legal ethicists" not dictated by precedent in this habeas case, see *Lambrix* v. *Singletary*, 520 U. S. 518, 529 (1997), the exact opposite is dictated by precedent.

The rules governing whether conduct is ethical and the rules governing when final judgments will be set aside differ for good reason. The rules of professional ethics operate prospectively. Their goal is to tell lawyers in advance what they may and may not do in order to prevent or at least minimize the possibility of future harm. This is a fundamentally different purpose from that of a remedial system designed to correct or compensate for harms that have already occurred.

By analogy, the prohibition against driving while intoxicated is a preventative rule. It prohibits an action which creates a danger of harm even though it is not inherently harmful. A person who violates that prohibition may be punished, even though he makes it home without hurting anyone. The remedial system comes into action if and only if the drunk driver actually causes harm. Then a private person will have an action for damages against the driver and the owner of the car, and in

most cases the car's insurer is the one who actually pays. Actual harm creates both the private right of action, as opposed to a public prosecution, and widens the net to persons other than the malefactor.

Amici supporting petitioner protest the lack of "legal consequence" if a conflict causing no harm does not result in the setting aside of this final judgment. See Legal Ethicists' Brief 17. Not so. Attorneys who breach the rules without causing harm, like drunk drivers who do not cause accidents, are subject to public prosecution, *i.e.*, bar discipline. For a private party, the client, to obtain redress from the state, which is not the malefactor, actual harm should be shown.

The Court in *Nix* v. *Whiteside* nonetheless went on to examine professional norms, employing them as marking the outer boundary of possible Sixth Amendment requirements. "Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard." 475 U. S., at 175. If the present case involves no conflict under prevailing norms, then there is no conflict violating the Sixth Amendment, although the converse is not necessarily true.

B. No Actual Conflict.

Amici supporting petitioner insist that trial counsel had an actual conflict of interest as a result of his prior, brief representation of the murder victim in an unrelated matter, independently of whether any confidential information is involved. See Legal Ethicists' Brief 13. This argument glosses over the distinction between current and former clients. *Amici*'s premise is that a lawyer has a continuing duty of loyalty to former clients not to bring out information damaging to their reputation, even if that information is unrelated to the prior representation and independent of any confidential communication. This premise is false.

The American Bar Association Model Rules of Professional Conduct (2001 ed.) (cited below as "Model Rules") have separate rules for present and former clients. The differences are significant:

"Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

"(a) A lawyer shall not represent a client if the representation of that client will be *directly adverse to another client*, unless:

"(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

"(2) each client consents after consultation.

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

"(1) the lawyer reasonably believes the representation will not be adversely affected; and

"(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." *Id.*, Rule 1.7, at 24-25 (emphasis added, footnote omitted).

"RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

"(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

[(b) omitted]

"(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

"(1) *use information relating to the representation to the disadvantage of the former client except* as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or *when the information has become generally known*; or

"(2) *reveal information relating to the representation* except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client." *Id.*, Rule 1.9, at 32-33 (emphasis added, footnote omitted).

Rule 1.7(a) establishes a general duty of nonadversity for present clients. In sharp contrast, Rule 1.9 limits the duty regarding former clients to the "same or substantially related matter." The Restatement is in accord. See 2 American Law Institute, Restatement (Third) of the Law Governing Lawyers § 132, pp. 376-377 (2000). The forcible sodomy and brutal murder of Timothy Hall by Walter Mickens is not "substantially related" to the allegations that Hall previously shoved his mother and wrapped a bread knife in newspaper. Trial counsel Saunders was therefore partially correct when he stated that his duty to Hall ended with Hall's death and the dismissal of the charges against him.

As *amicus* Deborah Rhode puts it,

"In general, this personal loyalty to current clients ends when the representation ends. If lawyers were unable to accept new matters adverse to past as well as current clients, the rules would be unworkable. . . . Thus, it is often said that the rules governing simultaneous representation of conflicting interests are based on loyalty and confidentiality, while the rules governing successive representation are based on confidentiality alone." D. Rhode & D. Luban, Legal Ethics 518 (2d ed. 1995).

The only *potential* conflict lay in the continuing duty to preserve client confidences under Rule 1.9(c). This is where the evidentiary hearing in the habeas court comes in.

Like other ineffective assistance issues, conflict issues normally cannot be decided on the appellate record. That is why they are typically determined on collateral review, with an evidentiary hearing. Such a hearing was held in this case. The case is not to be decided on a cold appellate record, drained of content by the very alleged conflict at issue. Cf. Brief for Petitioner 45. This case is to be decided after a full evidentiary hearing with the opportunity to summon and present witnesses.

Trial counsel testified and the District Court found that no pertinent confidential information is involved in this case. See *Mickens* v. *Greene*, 74 F. Supp. 2d 586, 606 (DC ED Va. 1999), J. A. 290-291. The requirement of confidentiality does not preclude the use of "information relating to a former client that is in the 'public domain . . . .' " Model Rules, *supra*, at 35; accord Restatement, *supra*, § 132(2), at 377 ("unless that information has become generally known"). The information adverse to Hall's reputation had been printed in the local newspaper, see *supra*, at 2, and it is difficult to get more "public" than that. Petitioner insists that counsel was ethically forbidden to investigate based on formerly confidential leads when the essence of the information had since been printed in the newspaper. Brief for Petitioner 44. Under prevailing norms there is no such ethical constraint and hence, under *Nix* v. *Whiteside*, *supra*, no Sixth Amendment conflict.

Undoubtedly, trial counsel in this case demonstrated an ethical tin ear. The proper course was to disclose the facts to both defendant and the court, make a record that no actual conflict existed, and permit defendant to request different counsel if he had any doubts of Saunders' loyalty. See 74 F. Supp. 2d, at 601. Yet even a tone deaf musician can strike a correct chord occasionally. Saunders blundered his way to the correct conclusion that no actual conflict existed in this case.

II. *Teague* applies to this case and is fairly included in the question presented.

The question presented in this case is, "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?" *Mickens* v. *Taylor*, 532 U. S. __, 149 L. Ed. 2d 467, 121 S. Ct. 1651 (2001). The issues to be considered by the Court are therefore limited to this question and those "fairly included therein." See Supreme Court Rule 14.1(a).

The nonretroactivity principle of *Teague* v. *Lane*, 489 U. S. 288 (1989) is "fairly included therein." "A *threshold* question in *every* habeas case . . . is whether the court is obligated to apply the *Teague* rule to the defendant's claim." *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) (emphasis added). Arguing nonretroactivity in the body of the argument at the petition stage is sufficient to preserve the issue even for the certiorari petitioner. *Id.*, at 389-390. *A fortiori*, it is sufficient for the certiorari respondent, see Brief in Opposition 24-25, 28-29 (retroactivity argument), who has broader latitude to defend rather than attack the judgment below. See *Schenck* v. *Pro-Choice Network*, 519 U. S. 357, 384, n. 12 (1997).

For the reasons stated in part III, *infra*, and in respondent's brief, this Court's precedents make the question presented straightforward even on a *de novo* basis. (That is, the answer is "no.") However, the answer is even clearer under *Teague*, because the Court need only ask what the rules were in 1997, not the always-debatable question of whether they should be changed. The *Teague* rule has been criticized as complicating the habeas court's task, see, *e.g.*, Lay, The Writ of Habeas Corpus: A Complex Procedure for a Simple Process, 77 Minn. L. Rev. 1015, 1042 (1993), but the complications come primarily from attempts to evade the rule. The principle simply is that any pushing of the legal envelope must be done on direct

review. So, too, must resolution of conflicts where multiple, well-considered decisions are divided. See *Caspari* v. *Bohlen*, 510 U. S., at 395. Habeas is strictly for enforcement of existing rules. The *Teague* issue is clear whenever the underlying question is close, as well as when the underlying question is clear in the state's favor. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (noting equivalence of *Teague* "old rule" with "clearly established" under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")). Both *Teague* and the AEDPA's similar rule of 28 U. S. C. § 2254(d) will usually make it unnecessary to decide the underlying question. As soon as the habeas court determines that the proposed rule would be "new" or is not "clearly established," or that a state court's application of an old rule is "reasonable," its task is finished. See *Teague*, 489 U. S., at 316; *Penry* v. *Johnson*, 532 U. S. __, 150 L. Ed. 2d 9, 23-24, 121 S. Ct. 1910, 1919 (2001) ("We need not and do not decide . . ."). Properly applied, *Teague* and § 2254(d) streamline rather than complicate the habeas process. See *Williams*, *supra*, at 404 (congressional purpose "to curb delays").

Despite the considerable overlap between *Teague* and § 2254(d), *Teague* survives as an independent limitation on the habeas remedy. Some early post-AEDPA writings of the opponents of habeas reform postulated that *Teague* had been supplanted. See, *e.g.*, Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of the Federal Courts, 98 Colum. L. Rev. 696, 866 (1998). That was wishful thinking on their part. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 959, n. 500 (1998).

In particular, the *Teague* rule applies and has independent force where there has been no state court decision on the merits of the claim, and hence § 2254(d) is inapplicable. Most such claims are either unexhausted or procedurally defaulted, but in a few cases they may be decided on *Teague* grounds. *Teague* was applied in the post-AEDPA case of *Breard* v. *Greene*, 523

U. S. 371, 376-377 (1998) (*per curiam*), to reject a claim when petitioner contended that the novelty of the claim excused his default. Occasionally it may be more efficient to dispose of a defaulted claim on *Teague* grounds when the default issue presents difficult questions while the *Teague* issue is straightforward. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). *Teague* can also preclude a defaulted claim where the "cause and prejudice" exception to default has been met.

In the present case, the Court of Appeals found the "cause" element established. *Mickens* v. *Taylor*, 240 F. 3d 348, 356 (CA4 2001) (en banc). The court then held that if petitioner could qualify for the Sixth Amendment "presumption of prejudice" by establishing both actual conflict and adverse effect, that presumption would carry over to the prejudice prong of the procedural default analysis. *Id.*, at 357. Since that issue is not fairly included in the question presented, *amicus* will not address it. It is sufficiently knotty to bring this case within the rationale of *Lambrix*, invert the usual order of decision, and dispose of this *Teague*-barred claim on *Teague* grounds rather than procedural default.

> "In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed,' [citation] and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution,' [citation]. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Bohlen*, 510 U. S., at 390 (alterations in *Bohlen*).

The date of finality is October 14, 1997. See *Mickens* v. *Virginia*, 520 U. S. 1269 (June 9, 1997) (denying certiorari on direct appeal), reh'g denied, 522 U. S. 928 (Oct. 14, 1997); *Bohlen*, *supra*, at 390 ("final" when certiorari "finally denied"); *Missouri* v. *Jenkins*, 495 U. S. 33, 46 (1990) (judgment not final while rehearing petition pending, in a different context).

In part III, *infra*, we will briefly survey the legal landscape, deferring to respondent's brief for a more thorough discussion of the merits. In part IV, we propose a bright-line rule for resolving the *Teague* question in cases such as this one. The narrow exceptions are obviously inapplicable.[2]

III. Pertinent Supreme Court precedent squarely states an adverse effect requirement.

From the ethical standards quoted and discussed in part I, *supra*, it is evident that concurrent representation of multiple defendants in the same case presents a far greater danger of conflict of interest than prior representation of the victim of a crime in an entirely unrelated matter. As the commentary to the Restatement notes, "joint representation in criminal cases *often* has a material and adverse effect on the representation of each defendant . . . ." 2 American Law Institute, Restatement (Third) of the Law Governing Lawyers, § 129, Comment *c*, p. 351 (2000) (emphasis added). In contrast, a prominent capital defense advocate notes that only rarely is it even possible to impugn the character of the victim. See Coyne, Inflicting *Payne* on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases, 45 Okla. L. Rev. 589, 614 (1992). Even where it is possible, such an attack will

2. Petitioner's proposed rule would not legalize murder and forcible sodomy. A rule overturning convictions for a defect that had no effect whatever on the outcome does not implicate the fundamental fairness and accuracy of the criminal proceeding, at least not in a positive direction. Cf. *Bohlen*, *supra*, at 396.

typically be strategically unwise due to its potential to alienate the jury. See Wallace, The Ethical Considerations of Defense Strategies When Confronted With Victim-Impact Statement—Give Us Dirty Laundry?!, 13 Thomas M. Cooley L. Rev. 991, 1012 (1996).

Sequential representation of the victim and perpetrator in unrelated matters, therefore, would only rarely have a material and adverse effect on representation. Where the lawyers have no relevant, confidential, nonpublic information from the former client, as in this case, there is no conflict at all. Where the lawyers do have such information, the only effect is that they cannot use it, see Restatement, *supra*, § 132, Comment *f*, Illustration 6, at 383, which is the same as having a lawyer who does not know the information.

Certainly it is objectively reasonable to believe that there is no greater burden on the trial court and no lesser showing required of the defendant in the sequential representation situation than there is in the concurrent representation situation. A weak argument could be made for such a differential based on the fact that common defense sometimes has a benefit, see *Burger* v. *Kemp*, 483 U. S. 776, 783-784 (1987), but no such subclassification of types of conflict is even intimated by, much less "dictated" by, this Court's precedents. Applying the concurrent representation precedents at face value to the sequential representation situation cannot be considered objectively unreasonable.

Cuyler v. *Sullivan*, 446 U. S. 335 (1980) held in part IV A, "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.*, at 347. Concurrent representation alone is not enough, and sequential representation is even less. Specifically, if the possibility inherent in every criminal case of inconsistent defenses of co-defendants is not enough to trigger the duty of inquiry, then the much lesser possibility of putting the dead victim on trial in a capital case cannot be. *Sullivan* then held in part IV B that "a defendant who raised no objection at trial must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.*, at 348. The condition stated for this requirement is lack of objection. The only reference to trial court inquiry in part IV B comes in a footnote accompanying this statement. The Court cited seven Court of Appeals cases as consistent with its holding, followed by a "cf." cite to a case holding "burden of proof shifts when trial court fails to inquire into possibility of conflict." The "cf." signal indicates that this case is at variance with the Court's holding. *Sullivan* does not hold that finding a trial court duty to inquire obviates the adverse effect requirement. Its rule is stated in broader terms, and subsequent cases confirm that breadth.

Wood v. *Georgia*, 450 U. S. 261 (1981) is the mainstay of the argument that the law has changed since *Sullivan*, or, alternatively, that *Sullivan* contains an unstated exception to its plainly stated rule. See Brief for Petitioner 29. *Wood* is an unlikely candidate to carry such a burden.

In *Wood*, the defendants were low-level employees of a pornographic theater and affiliated bookstore. See 450 U. S., at 263-264, and n. 3. They were fined thousands of dollars. *Id.*, at 263. The employer provided the defense counsel, and the employees expected the employer to pay the fines, but it did not. *Id.*, at 264, 266-267. As they were unable to pay themselves, their probation was revoked, and they were ordered to jail. *Id.*, at 264, and n. 2. The Court held that in this case, unlike *Sullivan*, the potential of conflict was strong enough to create a duty in the trial court to inquire. There was a powerful and apparent danger that the employer's interest in a test case directly collided with the employees' interest in leniency. *Id.*, at 270. The Court vacated and remanded for an actual conflict inquiry. *Id.*, at 272-274. Actual conflict and adverse effect are not separately discussed. The opinion implies that on the facts

of the case the two inquiries are intertwined. See *id.*, at 271-272.[3]

Justice White objected to the manner in which the Court reached the conflict issue, believing that the Court lacked jurisdiction over it.

> "The Court apparently believes that under *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), the possibility of a conflict of interest of constitutional dimensions should have prompted further inquiry by the trial judge. But *Cuyler* v. *Sullivan* did not purport to give this Court jurisdiction over a claim otherwise beyond its reach. *Cuyler* held only that if a trial court 'reasonably should know that a particular conflict exists,' *id.*, at 347, then a failure to initiate an inquiry may constitute a Sixth Amendment violation. If this is the case here, then petitioners remain free to seek collateral relief in the lower courts." *Id.*, at 280 (dissenting opinion).

In response to this objection, the Court dropped this footnote:

> "18. Justice White's dissent states that we have gone beyond the recent decision in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' *Id.*, at 347." *Id.*, at 272, n. 18 (emphasis in original).

In context, this footnote says nothing at all about the requirement of an adverse effect for an overturning of a criminal judgment. That prerequisite was not the basis of the dissent's objection, and hence there was no need to discuss it.

---

3. The existence of an adverse effect can be a factor in determining whether there is a conflict, see, *e.g.*, Model Rules, Rule 1.7(b)(1), at 25, and hence the two inquires may be intertwined.

On the facts of *Wood*, the adverse effect was obvious once the conflict was determined to be an actual one. There was no doubt that the employees were given fines far in excess of their ability to pay, and if the attorney had a conflict inhibiting his freedom to argue for leniency there was nothing more to establish.

If the *Wood* footnote were interpreted to say that *Cuyler* v. *Sullivan* mandates overturning a criminal judgment and ordering a new trial for failure to make an inquiry with nothing more, that statement by *Wood* would be manifestly wrong. *Sullivan* said nothing of the sort. *Sullivan* held that there was no duty to inquire in that case. The inquiry discussion properly ends with that holding. See 446 U. S., at 348.

Some indication of whether a case changes the law may be gleaned from the manner in which the Court decides it. In *Lambrix* v. *Singletary*, 520 U. S. 518 (1997), there was an argument that *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) (*per curiam*) could not be a new rule because it was decided summarily. See *Lambrix*, at 538-539. The Court did not deny that such an inference might generally have some weight, but it was not applicable to *Espinosa*, because the identical issue had been fully briefed and argued in another Florida case.[4] See *ibid.* *Wood* is the mirror image of *Espinosa*. Although *Wood* was a fully briefed and argued case, it was briefed and argued on an entirely different point. On the point actually decided, the Court was "without the benefit of briefing and argument." 450 U. S., at 272. As precedent, *Wood* should be regarded with the same skepticism as a summary decision. See *Hohn* v. *United States*, 524 U. S. 236, 251 (1998) (noting reduced

4. *Teague* itself is a variation on the same theme. The adoption of Justice Harlan's view of retroactivity was fully briefed, indeed proposed, by counsel for Teague, albeit in relation to a different issue. See *Teague* v. *Lane*, 489 U. S. 288, 300 (1989); Brief for Petitioner in *Teague* v. *Lane*, No. 87-5259, pp. 21-32.

precedential force when "the opinion was rendered without full briefing or argument").

New rules are occasionally made in summary decisions. *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), disapproved in part in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991), is the most prominent example. See *Tyler* v. *Cain*, 533 U. S. __, 150 L. Ed. 2d 632, 642, 121 S. Ct. 2478, 2482 (2001). It would be fair to say that new rules *should* not be made in summary decisions, although they sometimes are. If a summary decision appears to plow new ground, cf. *Teague*, 489 U. S., at 301, we must look to later cases to see whether anything grew in that furrow.

Strickland v. *Washington*, 466 U. S. 668 (1984) is the Court's most extensive and comprehensive discussion of when the shortcomings of counsel require reversal of a criminal judgment. See *id.*, at 671. *Strickland*'s analysis of the conflict cases bears directly on the question in this case and is worth quoting in full and in its surrounding context.

> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States* v. *Morrison*, 449 U. S. 361, 364-365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.
>
> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States* v. *Cronic*, *ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the

cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

"One type of actual ineffectiveness claim warrants a similar, *though more limited*, presumption of prejudice. In *Cuyler* v. *Sullivan*, 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and *the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts*, see e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, *the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above*. Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' *and* that 'an actual conflict of interest *adversely affected* his lawyer's performance.' *Cuyler* v. *Sullivan*, *supra*, at 350 (footnote omitted).

"Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.*, at 691-693 (emphasis added).

Strickland thus establishes a carefully constructed three-tier system based on the degree of the state's responsibility and the difficulty of showing adverse effect or prejudice. The first tier, requiring no showing at all, is reserved for direct state interference or violation of the clear and simple duty to appoint counsel. Conflicts generally are included in the second tier. There is no subdivision into cases where the trial court did or

did not have a duty to inquire further. The ability to inquire is expressly noted as the reason for reducing the normal "prejudice" showing down to the lower hurdle of adverse effect. The difficulties of proof are also cited as a reason for reducing, not eliminating, the defendant's burden of proof. Although this passage is arguably dictum, as *Strickland* is not a conflict case, it illustrates the Court's understanding of the different types of Sixth Amendment claims and the showing needed for each. This understanding was recently reiterated in *Smith* v. *Robbins*, 528 U. S. 259, 287 (2000).

Burger v. *Kemp*, 483 U. S. 776 (1987) applied the adverse effect requirement to a case where the potential for conflict was comparable to that in *Wood* and far stronger than the present case. *Burger* was a two-defendant capital murder case in which "each of the two defendants sought to emphasize the culpability of the other in order to avoid the death penalty." *Id.*, at 781. Two law partners were appointed to represent the two defendants in separate trials, *ibid.*, and the Court decided the case on the assumption that "two law partners are considered as one attorney" for conflict purposes. *Id.*, at 783; see also American Bar Association, Model Rules of Professional Conduct, Rule 1.10(a), p. 36 (2001 ed.).

The *Burger* Court does not ask or answer the question of whether the trial court had a duty to inquire *sua sponte* into the potential conflict. Instead, the Court rejects a blanket presumption of prejudice and requires a showing of both actual conflict and adverse effect. *Burger*, *supra*, at 783 (citing *Cuyler* v. *Sullivan* and *Strickland*). On this point, the Court was unanimous among the eight Justices who expressed an opinion.[5] The dissent concluded that the trial court did err in failing to inquire, *id.*, at 810 (Blackmun, J., dissenting), but nonetheless agrees that defendant did have to show an adverse effect. The dissent disagrees only with the application of the standard to the facts

---

5. Justice Powell did not address the conflict question. See *id.*, at 817-818 (dissenting opinion).

of the case, not with the statement of the standard. See *id.*, at 799, 809-810.

Burger makes clear that six years after *Wood*, the two-part *Cuyler* v. *Sullivan* standard applied to all claimed conflicts in the absence of an objection at trial, without regard to whether the trial court had a duty to inquire *sua sponte*.

The First Circuit in *Brien* v. *United States*, 695 F. 2d 10, 14-15, 20 (1982) applied *Cuyler* v. *Sullivan* and required an adverse effect, rejecting a broader interpretation of *Wood*. See *id.*, at 15, n. 10. *Amicus* Charles W. Wolfram states that *Brien* is a "common approach" to defining the burden. C. Wolfram, Modern Legal Ethics § 8.2, p. 415 (1986). Although a single opinion does not necessarily render an interpretation of this Court's precedents objectively reasonable, see *Williams* v. *Taylor*, 529 U. S. 362, 410 (2000), a widespread interpretation does, and it is error to resolve conflict with such an interpretation in the habeas petitioner's favor. See *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994).

In *People* v. *Bonin*, 47 Cal. 3d 808, 837-838, 765 P. 2d 460, 476 (1989) Justice Mosk, writing for the California Supreme Court, interpreted *Wood* and *Strickland* to require an adverse effect showing. Justice Marshall, dissenting from denial of certiorari, wrote, "This Court has never squarely resolved the question whether proof of adverse effect is required . . . ." *Bonin* v. *California*, 494 U. S. 1039, 1043 (1990). He found *Sullivan* unclear and *Wood* and *Strickland* "at odds." *Ibid.* The Ninth Circuit subsequently agreed that an adverse effect was required. *Bonin* v. *Calderon*, 59 F. 3d 815, 825 (1995), cert. denied, 516 U. S.1051 (1996).

If there was doubt in 1990, it appears to have disappeared by 1994. In *Burden* v. *Zant*, 510 U. S. 132 (1994) (*per curiam*), the public defender had concurrently represented both Burden and the principal witness against him and obtained immunity for the witness. See *Burden* v. *Zant*, 498 U. S. 433, 434-435 (1991) (*per curiam*). This Court twice summarily reversed the

Eleventh Circuit for failure to properly credit the state court factual finding on immunity. The second time, the remand order directed the lower courts "to determine whether Mr. Kondritzer's representations created 'an actual conflict of interest *adversely affect[ing]* [his] performance.' *Cuyler* v. *Sullivan*, 446 U. S. 335, 350 (1980)." 510 U. S., at 134 (emphasis added, alterations in *Burden*).

If we are to infer controlling standards from remand orders in unargued cases, the inference from *Burden* is stronger than the inference from *Wood*. First, *Burden* is the later decision. Second, *Burden* expressly states the requirement, while *Wood* merely omits mention of an element which was unlikely to be separately contested.

A survey of the legal landscape shows that the interpretation of precedents *most* favorable to petitioner's position is the one expressed by Justice Marshall: that *Wood* is "at odds" with later cases and the issue has not been "squarely resolved." The alternate interpretation is that *Wood* is not as broad as its footnote might be read, is limited by the facts of the case, has minimal precedential value as a decision on an unbriefed, unargued point, and is flatly contradicted by later authority. Any contention that petitioner's claimed rule is dictated by precedent within the meaning of the *Teague* line of cases is patently without merit.

IV. When the holding of a Supreme Court precedent, by its terms, is contrary to a proposed rule, the latter rule is *per se* "new," notwithstanding the nuances of other cases.

When Justice Harlan first proposed the rule that is now *Teague*, he acknowledged that it would sometimes be difficult to determine whether a rule is really "new." See *Desist* v. *United States*, 394 U. S. 244, 263 (1969) (dissenting opinion). Occasionally it is, but often it is quite straightforward. When the Court overrules a precedent on point, the rule of the overruling case is "new" beyond question. See *Butler* v.

McKellar, 494 U. S. 407, 412 (1990). *Amicus* submits that a second class of categorically "new" rules can be defined. That is, when the holding, not dictum, of a case states a rule of law, a proposal to make an exception to that rule or give it a lesser scope than it has on its face is a proposal for a new rule.

– A somewhat analogous principle can be found in the rule regarding application of this Court's precedents by lower courts. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). Similarly, if a rule stated by this Court is to be narrowed so as to have a smaller scope than originally stated, it is for this Court alone to make that limitation.

O'Dell v. *Netherland*, 521 U. S. 151 (1997) employed a principle similar to the one we suggest. At the time O'Dell's conviction became final, *California* v. *Ramos*, 463 U. S. 992 (1983) and *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) appeared to have established a general rule that giving the jury accurate information about postsentencing proceedings, including appeal, clemency, and parole, was a policy choice the states could make either way. See 521 U. S., at 163-164. Then, in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), "the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of postsentencing legal eventualities." *O'Dell*, *supra*, at 166. Prior to *Simmons* itself, failure to predict that such an exception would be carved out of the general rule could not be deemed unreasonable, and hence *Simmons* was a "new rule." *Ibid.*

The Court of Appeals panel, in effect, read *Wood* as carving out an exception to *Sullivan*'s adverse effect requirement merely by omitting any discussion of the requirement. *Mickens* v. *Taylor*, 227 F. 3d 203, 210-211 (CA4 2000). That inference

would be shaky enough if the line of cases ended at *Wood*, but it becomes particularly suspect in light of *Burger*'s invocation of the requirement in a case where the dissent asserted that the duty to inquire existed and had been breached, as well as *Burden*'s explicit requirement of adverse effect in its remand order.

The contention that *Sullivan*, *Strickland*, *Burger*, and *Burden* do not mean what they so clearly say brings to mind Justice Jackson's classic lament, now nearly half a century old yet as timely as the day it was written. "Whatever has been intended, this Court has also generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (opinion concurring in the judgment).

Teague and the corresponding rule of § 2254(d) share the common goal of enhancing finality by limiting the drastic remedy of collateral attack on final judgments to those claims that are based on clear violations of existing rules. See *Butler* v. *McKellar*, 494 U. S. 407, 413-414 (1990); *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000) (intent of Congress to limit); *Williams*, at 410-411. To achieve this goal, courts and counsel must be able to rely on the general rules as stated by this Court unless and until this Court *expressly* carves out an exception. *Sullivan*, *Strickland*, *Burger*, and *Burden* on their face state a general rule applicable to all claims of attorney conflict to which no objection was made at trial. If an exception is to be made, it must be made on direct review in a case postdating *Burger* and *Burden*. Until then, any proposal for such a rule is *per se* "new."

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

September, 2001

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation